**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

| | |
|---|---|
| In the Matter of<br>Developing a Unified Intercarrier Compensation Regime | CC Docket No. 01-92 |

# REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC


John T. Nakahata
Charles D. Breckinridge
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW, Suite 1200
Washington, DC 20036
(202) 730-1300

Cindy Z. Schonhaut
William P. Hunt, III
Level 3 Communications LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-1000

*Counsel for Level 3 Communications LLC*


**July 20, 2005**

**Summary of Reply Comments of**
**Level 3 Communications, LLC**

As the Commission considers the various reform proposals placed in the record, it should keep in mind the following points:

- The Reformed Regime Will Not Be in Place Until the End of the Decade. This proceeding is fundamentally not about how intercarrier compensation should be structured in 2005 and 2006. Rather, given the need for a market transition, the Commission is developing the regime it wants to have in place by 2009 - 2010. As such, any plan must recognize that wireless and IP-enabled services – including IP-IP applications – will be even more prevalent in the marketplace of 2010 than they are today.

- IP-to-IP Services Will Replace PSTN-Based Services in Increasing Numbers. As more and more households and businesses subscribe to broadband services, it will become increasingly possible to transmit communications on an IP-IP basis, and PSTN-based communications will likely wane. Already "push-to-talk" service, voice enabled Instant Messaging ("IM"), peer-to-peer VoIP services, and even non-voice services such as e-mail and IM are allowing people to communicate while bypassing the PSTN entirely. Indicative of this, end user telecommunications revenues have decreased year-over-year since 2001.

- Any Reform Plan Must Substantially Harmonize PSTN Intercarrier Compensation Mechanisms With the Market Structure for IP-Based Services. The Commission should work to achieve this harmony, however, without thrusting the inefficiencies and high administrative costs of existing PSTN interconnection and intercarrier compensation regimes on the Internet.

- The Commission Must Also Recognize that Substantial Concentration in PSTN Local Markets Precludes Deregulation of PSTN-Based Interconnection and Intercarrier Compensation. As the Commission's most recent local competitions statistics show, ILECs still control over 80% of wireline switched access lines. At this level, ILECs have the market power to extract above-market prices for interconnection and traffic exchange from their competitors. Congress sought to control this market power in the Telecommunications Act of 1996 by regulating the price that an incumbent LEC may charge for transport and termination. *See* 47 U.S.C. § 252(d)(2).

Considering these fundamental principles, the Intercarrier Compensation Forum ("ICF") has presented the best and most comprehensive proposal. Notably, the ICF Plan would achieve the following goals within three years (i.e., by July 2009 for a plan commencing July 1, 2006):

- A Unified Intercarrier Compensation Structure. The ICF Plan would unify today's reciprocal compensation structure (in which termination fees are assessed but origination fees are not) and the access charge system (in which LECs assess both origination and termination fees). By creating a unified structure, the ICF Plan eliminates many of the disputes, particularly involving wireless, VoIP and ISP-bound traffic, as to whether a particular call is subject to reciprocal compensation or to access charges.

- Uniform Termination Rates Across Jurisdictions. The ICF Plan unifies the disparate termination rates that currently vary by jurisdiction, eliminating the differences between intrastate access, interstate access, non-ISP reciprocal compensation and ISP-bound rates. Notably, there is little dispute in the record about the need to unify termination rates.

- Uniform Termination Rates Across Carriers. The ICF Plan also unifies termination rates across carriers, thereby eliminating the incentives for carriers to shift their operations from, for example, urban areas to neighboring rural areas in order to maximize the amount of intercarrier compensation they can receive.

- Unified Interconnection. The ICF Plan creates a unified interconnection system that treats all traffic exchanged by two carriers in the same manner, allowing carriers to design their networks for engineering efficiency rather than for regulatory needs.

Just as significantly, by ultimately phasing out carrier-to-carrier recovery of termination costs and replacing that with recovery from the carrier's end user customer, the ICF Plan migrates PSTN-based services to the cost-recovery system that characterizes the Internet and wireless network today *i.e.*, the customer purchasing network access (e.g. cable modem service, DSL, or wireless voice stream) procures a *two-way* connection to the network. By matching the PSTN cost recovery mechanisms with the cost-recovery mechanisms for network access on the Internet, the ICF Plan avoids what will otherwise be an inevitable clash between conflicting IP and PSTN cost recovery models.

For these reasons and the reasons set forth in the ICF's initial and reply comments, Level 3 supports the ICF Plan as the most balanced intercarrier compensation reform proposal that achieves fundamental reform.

Some parties suggest that the Commission "clarify," modify or repeal its treatment of ISPs as "end users" under the access charge regime – which is often referred to as the "ESP Exemption." The Commission should not do so, and instead should reaffirm that the ESP exemption applies to all traffic that an ISP receives or sends to the PSTN. The Commission should also reject Qwest's crabbed and competitively biased application of the ESP exemption when there are multiple carriers. The Commission cannot lawfully require payment of intrastate access charges for IP-PSTN VoIP traffic, which the Commission has ruled to be under the federal jurisdiction. Moreover, apply interstate access charges on all IP-PSTN VoIP traffic, including traffic between locally-rated numbers, would be anticompetitive. The Commission should, however, provide clarity as to how IP-PSTN VoIP traffic will be treated during the transition between the current regimes and the final, reformed and unified intercarrier compensation system.

The Commission also should not treat ISP-bound traffic differently than other non-access traffic during the transition or in its final regime. The ICF Plan proposes a reasonable, balanced and legally supportable transition plan for ISP-bound traffic. With ISP-bound traffic in decline as broadband subscribership increases, the public interest does not require flash-cutting ISP-bound traffic to bill-and-keep or apply originating access charges to some or all ISP-bound traffic. The Commission should clarify that ISP-bound traffic should be rated on the basis of NPA-NXX pending comprehensive reform. Finally, the Commission should reject the Rural Alliance's anticompetitive proposal to apply originating access charges to any ISP-bound traffic for which the ISP is not served by the ILEC, but to apply no such charges when the ISP is served by the ILEC. The Rural Alliance's proposal is blatantly discriminatory and protectionist.

## TABLE OF CONTENTS

**REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC**

## I. INTRODUCTION.

Level 3 Communications, LLC, hereby replies to the comments filed in response to the Commission's *Intercarrier Compensation FNPRM*.[1] The comments support the statements of the Chairman and all commissioners that intercarrier compensation reform is among the preeminent matters that this Commission must resolve. Virtually all commenters agree that the legacy intercarrier compensation mechanisms are in need of overhaul, but parties vary widely as to the nature of the solution.

As the Commission considers the various reform proposals placed in the record, it should keep in mind the following points:

- The Reformed Regime Will Not Be in Place Until the End of the Decade. This proceeding is fundamentally not about how intercarrier compensation should be structured in 2005 and 2006. Rather, given the need for a market transition, the Commission is developing the regime it wants to have in place by 2009 - 2010. As such, any plan must recognize that wireless and IP-enabled services – including IP-IP applications – will be even more prevalent in the marketplace of 2010 than they are today.

- IP-to-IP Services Will Replace PSTN-Based Services in Increasing Numbers. As more and more households and businesses subscribe to broadband services, it will become increasingly possible to transmit communications on an IP-IP basis, and PSTN-based communications will likely wane. Already "push-to-talk" service, voice enabled Instant Messaging ("IM"), peer-to-peer VoIP services, and even non-voice services such as e-mail and IM are allowing people to communicate while bypassing the PSTN entirely. Indicative of this, end user telecommunications revenues have decreased year-over-year since 2001.[2]

---

1 *See Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005).

2 *See* FCC, Wirleline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 15.1 (rel. June 21, 2005).

- Any Reform Plan Must Substantially Harmonize PSTN Intercarrier Compensation Mechanisms With the Market Structure for IP-Based Services. The Commission should work to achieve this harmony, however, without thrusting the inefficiencies and high administrative costs of existing PSTN interconnection and intercarrier compensation regimes on the Internet.

- The Commission Must Also Recognize that Substantial Concentration in PSTN Local Markets Precludes Deregulation of PSTN-Based Interconnection and Intercarrier Compensation. As the Commission's most recent local competitions statistics show, ILECs still control over 80% of wireline switched access lines.[3] At this level, ILECs have the market power to extract above-market prices for interconnection and traffic exchange from their competitors. Congress sought to control this market power in the Telecommunications Act of 1996 by regulating the price that an incumbent LEC may charge for transport and termination. *See* 47 U.S.C. § 252(d)(2).

Considering these fundamental principles, the Intercarrier Compensation Forum ("ICF"), in which Level 3 has participated, has presented the best and most comprehensive proposal. Notably, the ICF Plan would achieve the following goals within three years (i.e., by July 2009 for a plan commencing July 1, 2006):

- A Unified Intercarrier Compensation Structure. The ICF Plan would unify today's reciprocal compensation structure (in which termination fees are assessed but origination fees are not) and the access charge system (in which LECs assess both origination and termination fees). By creating a unified structure, the ICF Plan eliminates many of the disputes, particularly involving wireless, VoIP and ISP-bound traffic, as to whether a particular call is subject to reciprocal compensation or to access charges.

- Uniform Termination Rates Across Jurisdictions. The ICF Plan unifies the disparate termination rates that currently vary by jurisdiction, eliminating the differences between intrastate access, interstate access, non-ISP reciprocal compensation and ISP-bound rates. Notably, there is little dispute in the record about the need to unify termination rates.

- Uniform Termination Rates Across Carriers. The ICF Plan also unifies termination rates across carriers, thereby eliminating the incentives for carriers to shift their operations from, for example, urban areas to neighboring rural areas in order to maximize the amount of intercarrier compensation they can receive.

[3] *See* FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2004*, Table 1 (rel. July 8, 2005).

- Unified Interconnection. The ICF Plan creates a unified interconnection system that treats all traffic exchanged by two carriers in the same manner, allowing carriers to design their networks for engineering efficiency rather than for regulatory needs.

Just as significantly, by ultimately phasing out carrier-to-carrier recovery of termination costs and replacing that with recovery from the carrier's end user customer, the ICF Plan migrates PSTN-based services to the cost-recovery system that characterizes the Internet and wireless network today *i.e.*, the customer purchasing network access (e.g. cable modem service, DSL, or wireless voice stream) procures a *two-way* connection to the network. By matching the PSTN cost recovery mechanisms with the cost-recovery mechanisms for network access on the Internet, the ICF Plan avoids what will otherwise be an inevitable clash between conflicting IP and PSTN cost recovery models.

Accordingly, for these reasons and the reasons set forth in the ICF's initial and reply comments, Level 3 supports the ICF Plan as the most balanced intercarrier compensation reform proposal that achieves fundamental reform. The remainder of these comments address transitional issues not addressed in the ICF Plan or that are not otherwise fully addressed in the ICF's comments and replies. First, Level 3 describes the Commission's long-standing treatment of Enhanced Service Providers and reveals the fallacy of arguments proposing the elimination or limitation of the ESP exemption. Second, Level 3 explains the status of ISP-bound traffic and urges the Commission to treat it in the same manner that it treats all other traffic.

## II. THE COMMISSION SHOULD NOT REPEAL OR LIMIT THE ESP EXEMPTION FOR IP-PSTN VOIP, BUT IT SHOULD PROVIDE INTERIM CLARITY ON THE TREATMENT OF IP-PSTN VOIP TRAFFIC.

Several incumbent LECs propose to alter the existing "ESP exemption" either on an interim basis or as part of permanent intercarrier compensation reform.[4] The Commission should do neither. As SBC points out, the best way for the Commission to address concerns about the ESP Exemption issues would be to adopt the ICF Plan. The ICF Plan harmonizes the treatment of carriers and ISPs by moving, within three years, to a true "minute is a minute" compensation plan. The harmonized ICF Plan would ensure a unified compensation structure, no intercarrier origination charges, and uniform intercarrier termination charges that ultimately transition to a model in which carriers recover all origination and termination costs from their own end user customers, supplemented by the universal service fund when necessary to maintain affordable and reasonably comparable end user rates. The ICF Plan does not, however, address the treatment of IP-PSTN IP-enabled services traffic during the initial three year transition.

Level 3 agrees that interim clarity on this point is necessary. As Level 3 pointed out during the Commission's consideration of its forbearance petition, ILECs alone have at least three different views of how this traffic should be addressed during the interim – and VoIP

---

[4] *See, e.g., Comments of the Rural Alliance*, CC Docket No. 01-92, at 162 (filed May 23, 2005) ("Rural Alliance Comments").; *Comments of SBC Communications Inc.,* CC Docket No. 01-92, at 20-21 (filed May 23, 2005) ("SBC Comments").; *Comments of Cincinnati Bell Inc.,* CC Docket No. 01-92, at 8 (filed May 23, 2005) ("Cincinnati Bell Comments").; *Comments of Surewest Communications.,* CC Docket No. 01-92, at 23 (filed May 23, 2005) ("Surewest Comments").; *Comments of Verizon,* CC Docket No. 01-92, at Attachment B (filed May 23, 2005) ("Verizon Comments").

providers generally have yet a fourth view.[5] The Commission, however, should not adopt any of the ILEC proposals for interim treatment of IP-PSTN VoIP traffic.

### A. The "ESP Exemption" Covers IP-PSTN VoIP Traffic.

The Commission has classified and repeatedly recognized Enhanced Service Providers as end users, not carriers, under the access charge regime, subjecting them only to end user charges, not to "carrier's carrier" charges. Notwithstanding this clear precedent, several incumbent LECs argue that current rules require the payment of "jurisdictionalized" compensation, including both interstate and intrastate access charges, on IP-PSTN traffic that terminates to the PSTN.[6] This argument is incorrect, and, as ITAA points out, is based upon an incorrect view of the ESP exemption.[7] Most notably, the ILECs ignore any analysis of Rule 69.5(b) and mischaracterize both the ESP exemption and its history. As the plain language of Rule 69.5(b) reflects, there is no basis for imposing access charges on an entity that is not an "interexchange carrier."

Rule 69.5 governs the assessment of circuit-switched per-minute access charges.[8] Although it is often referred to as an "exemption" from switched access charges that would otherwise be assessed, this characterization is misleading. In fact, the rule affirmatively classifies access customers as either "end users" or "carriers."[9] Customers classified as end

---

5 *See Letter of John T. Nakahata, Counsel to Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC,* WC Docket No.03-266, at 6-7, (filed February 14, 2005) attached as Exhibit 1.

6 *See* SBC Comments at 20; Rural Alliance Comments at 162.

7 *See Comments of the Information Technology Association of America*, CC Docket No. 01-92, at 2 (filed May 23, 2005).

8 *See* 47 C.F.R. § 69.5.

9 Rule 69.5(a) governs end users, and Rule 69.5(b) governs carriers. Rule 69.5(c) provides for special access charges surcharges. *See* 47 C.F.R. § 69.5.

users pay "end user charges,"[10] whereas "all interexchange carriers" that use local exchange switching facilities for the provision of interstate "telecommunications services" pay "carrier's carrier charges."[11] There is no equivocation in these classifications.

History leaves no doubt as to the meaning of Rule 69.5 and its treatment of ESPs. The Commission, when it first adopted the access charge regime, envisioned that it would "apply these carrier's carrier charges to interexchange carriers, and to all resellers and enhanced service providers other than those, such as hotels, who provide their communications service solely at their own premises, or where the service is intended for internal administrative purposes."[12] The Commission, however, never implemented that initial vision with respect to ESPs. To the contrary, to avoid "rate shock" and to have "time to develop a comprehensive plan for detecting all such usage and imposing charges in an evenhanded manner," the Commission decided to treat ESPs as end users, rather than carriers, with respect to carrier access charges.[13] Thus, as the Commission acknowledged when it again reviewed its Part 69 rules as they related to enhanced services providers, "[u]nder our present rules, enhanced service providers are treated as end users for purposes of applying access charges."[14]

---

[10] In general, end users pay local business rates and interstate subscriber line charges for their switched access connections to LEC central offices.

[11] 47 C.F.R. § 69.5(b).

[12] *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d. 682, 711 (¶ 76) (1983).

[13] *Id*. at 715 (¶ 83).

[14] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631, 2631 (¶ 2 n.8) (1988).

As reflected in Exhibit 2, the FCC has examined ESPs' status as "end users" under the access charge rules four times since 1983, and it has reaffirmed that treatment each time. In its 1988 *Enhanced Services Providers Order*, the Commission stated:

> [T]he current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users.[15]

And that status was carried over in the 1996 Act,[16] which mirrors the definitions of "basic" and "enhanced" services in its terms "telecommunications service" and "information service."[17] Moreover, the 1996 Act defines a "telecommunications carrier" as a provider of telecommunications services, and it clarifies that a telecommunications carrier cannot be a common carrier with respect to services that are not telecommunications services.[18] Thus, information service providers, like their predecessor ESPs, are even more clearly end users, not carriers, under the terms of Rule 69.5.[19]

---

15 *Id.*, 3 FCC Rcd. at 2633 (¶ 20 n.53).

16 The broadly applicable end-user classification had been affirmed again in 1991. *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd. 4524, 4535 (¶ 60) (1991).

17 *See* 47 U.S.C. §§ 153(46), 153(20).

18 *See* 47 U.S.C. §§ 153(20), (43), (44), (46).

19 While the definition of "information services" is not identical to the definition of "enhanced services," "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'" *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, at 21955-56 ¶ 102 (1996).

Since the adoption of the 1996 Act, the Commission has continued to reaffirm the ESPs' status as end users, rather than carriers, under Rule 69.5.[20] In its *First Report & Order* in the *Access Reform* docket, the Commission (using the term "ISP" to refer to both ESPs and providers of information services)[21] again noted that since the 1983 *Access Charge Reconsideration Order,* "ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."[22] It then made clear that it was not altering that classification or its effect under Rule 69.5: "We decide here that [information service providers] should not be subject to interstate access charges."[23] The Commission thus foreclosed all doubt as to whether the change in terminology from "enhanced service" to "information service" in the 1996 Act somehow altered the so-called "ESP exemption." Moreover, as in all previous orders dealing with the exemption, the Commission did not distinguish between various types of information service providers based on their varying uses of the underlying PSTN.

Other filings from the same period confirm that, as of the 1997 *Access Reform Order*, everyone understood that all information service providers are end users not subject to carrier access charges. Shortly after adoption of the 1996 Act, an industry group called America's

---

[20] *See Access Charge Reform*, First Rep. & Order, 12 FCC Rcd. 15982 (1997) ("*Access Charge Reform Order*").

[21] *See* i*d.*, 12 FCC Rcd. at 16131 (¶ 341 n.498).

[22] *Id.*, 12 FCC Rcd. at 16132 (¶ 342).

[23] *Id.*, 12 FCC Rcd. at 16133 (¶ 345). Because "the access charge system contains non-cost-based rates and inefficient rate structures," the Commission believed that the rule was still needed to promote the "still-evolving information services industry." *Id*., 12 FCC Rcd. at 16133 (¶ 344). The Commission also discredited the theory that non-assessment of access charges results in information service providers imposing uncompensated costs on ILECs (*see id.,* 12 FCC Rcd. at 16133-34 (¶ 346)), as well as ILEC allegations regarding network congestion. *See id*., 12 FCC Rcd. at 16134 (¶ 347).

Carriers Telecommunication Association ("ACTA") filed a petition with the FCC seeking a declaratory ruling that companies offering IP telephony services were providing "telecommunications services."[24] To the extent the ILECs commented, they argued that the problem was "not the exclusion from regulation" provided to information services, but "the ESP exemption from access charges."[25] Pacific Bell (now part of SBC) acknowledged that the so-called ESP exemption applied to "all ESPs," including software-enabled IP communications providers, and "including also Internet Access Providers, On Line Service Providers, Bulletin Board Providers, Voice Mail Providers, and others."[26] The United States Telephone Association agreed, stating that a "rulemaking proceeding to consider access charge reform is imperative and . . . such a proceeding [must] include a review of the changing use of the network and the ESP exemption."[27] None of these commenters suggested that the so-called "ESP exemption" did not apply to IP telephony.

Nonetheless, ILECs have contended that IP-PSTN services, despite their status as information services, are subject to access charges because the so-called "ESP exemption" only "applies where the LEC's exchange access services are being used to provide the link *between* the ISP and its subscribers, for the provision of an information service by the ISP to

---

[24] *See The Provision of Interstate and International Interexchange telecommunications Service Via the "Internet" by Non-Tariffed, Uncertified Entities,* America's Carriers Telecommunications Association Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking , RM-8775 (filed Mar. 4, 1996). The Commission never ruled on the ACTA petition, thus effectively denying it.

[25] *Pacific Bell and Nevada Bell Comments*, RM-8775 at 8 (filed May 8, 1996) ("Pacific Bell Comments"). *See also United States Telephone Association Comments*, RM-8755 (filed May 8, 1996) ("USTA Comments"); *Southwestern Bell Comments*, RM-8775 (filed May 8, 1996).

[26] Pacific Bell Comments, RM-8775 at 8.

[27] USTA Comments, RM-8775 at 3.

its subscriber."[28] As a matter of plain language, there is no such limitation on either the term "end user" or the term "interexchange carrier" within the text of Rule 69.5(a) or (b).

The ILECs have quoted language out of context from the FCC's 1997 *Access Charge Reform Order* to suggest that the Commission created a new limitation. In fact, however, the 1997 *Access Charge Reform Order* confirmed that "although information service providers (ISPs) may use incumbent LEC facilities to originate *and terminate* interstate calls, ISPs should not be required to pay interstate access charges."[29] The so-called ESP exemption thus was *not* limited to traffic originating from an ESP's customers, as the ILECs have argued.

In addition, the Commission's rulings in the *Access Charge Reform Order* were categorical, stating that "the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs," and that "ISPs should not be subject to interstate access charges."[30] These clear, unqualified, declarative sentences undermine the ILECs' purported exception for communications between an ESP and persons that are not the ESP's retail customers.

Finally, it is notable that the ILECs quote language from the 1997 *Access Charge Reform Order*'s background section, not its discussion section. The passage in question reads, in full, "[w]e explained [in the NPRM] that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use the incumbent LEC networks to receive calls from their

---

[28] *SBC Comments on Level 3 Forbearance Petition*, WC Docket No. 03-266, at 14 (filed March 1, 2004) (emphasis in original); *see also Verizon Comments on Level 3 Forbearance Petition*, WC Docket No. 03-266, at 10 (filed March 1, 2004); *BellSouth Comments on Level 3 Forbearance Petition*, WC Docket No. 03-266, at 6 (filed March 1, 2004); *SBC Communications Inc., Comments* at 19 (filed March 1, 2004).

[29] *Access Charge Reform Order*, 12 FCC Rcd at 16,131-32 (¶ 341) (emphasis added).

[30] *Id.*, 12 FCC Rcd at 16133 (¶¶ 344-345).

customers."[31] This language does not characterize ESPs as "carriers" when they send or receive communications from end users who are not their own customers. Rather, it reflects the FCC's tentative conclusion in the NPRM *rejecting* arguments by ILECs and others "that ESPs impose costs on the network that are similar to those imposed by providers of interstate voice telephony and that ESPs should therefore pay interstate access charges."[32] To suggest otherwise is disingenuous.

### B. IP-PSTN Services Do Not Fall Within Any Other Exception to the Net Protocol Conversion Rule.

Some parties have, in other dockets, argued that the "net protocol conversion" rule (under which communications with a net protocol conversion are considered to be information services) examines a communication from the point at which the calling party picks up its CPE to the point at which the called party picks up its CPE.[33] This interpretation of the rule ignores the FCC's precedent. In distinguishing between basic and enhanced services, the FCC has determined that a service is basic when "information enters a carrier's network on protocol 'A' it must exit the network on the same protocol, even though within the network it could be converted to 'x', 'y', or 'z' protocols for network traffic management or security purposes."[34]

---

[31] *Id.*, 12 FCC Rcd. at 16133 (¶ 343).

[32] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21354, 21479 (¶286) (1996).

[33] *See, e.g., NASUCA Comments on Level 3 Forbearance Petition*, WC Docket No. 03-266 at 15 (filed May 28, 2004). ("NASUCA Comments").

[34] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order, 84 FCC 2d 50, 60 (¶ 26) (1980).

The FCC's net conversion test examines the format of *an electronic transmission* on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated – not from one person's mouth to another one's ears. Human beings do not communicate using electronic signals, either analog or digital. For humans to use any means of electronic communication, they must have some equipment to convert speech (sound waves) or text (symbols on a video screen or piece of paper) into electronic form, and to convert electronic impulses back into a form that can be perceived by the human ear or eye. In the extreme sense suggested by some commenters, the only way a communication would qualify as a net protocol conversion would be to convert the human voice into an electronic signal and never convert that signal back into a human voice. This interpretation of the test is of course absurd, because humans could not understand what was being communicated if the communication is not converted back to sound waves.

In short, the "end" that is relevant for the net protocol conversion rule is the point where the traffic leaves the customer's premises and enters the network, typically referred to as the demarcation point. With respect to an IP-PSTN communication, the traffic leaves the customer's premise and enters the network in IP protocol, and it exits the network to the called party's customer premise in TDM protocol. It therefore satisfies the net protocol conversion test and qualifies as an information service.

Other exceptions identified by VoIP opponents are easily dismissed because they apply only to services without net protocol conversions. First, some note that a protocol change performed "between an end user and the network itself . . . for the initiation, routing and termination of calls" falls within an exception for communications between a user and

the network itself for purposes of initiating, routing or terminating a call.[35] By its terms, however, this exception does not apply to IP-PSTN services, as IP-PSTN service providers do not merely convert protocols "between the subscriber and the network," but rather convert protocols between the subscriber and the other end-point of the transmission. In attempting to squeeze IP-PSTN services into this exception, opponents ask the Commission to ignore this core function of IP-PSTN service. The FCC has already rejected such arguments. As the Commission has explained, this exception merely restates the rule that the protocol conversion test "applies only to end-to-end communications between or among subscribers."[36]

Second, some assert, "the protocol conversion occurs for the sole purpose of facilitating the transparent transmission of the user's information."[37] This is another restatement of the "net conversion" rule: "conversions taking place solely within the network that result in no net conversion between users--should be treated as basic services."[38] But in IP-PSTN services there are not two conversions that take solely within the network, but a single protocol conversion that transforms the information and changes its form as sent and received.[39]

---

35 NASUCA Comments at 20.

36 *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, 13719 (¶ 14) (1995) ("*Frame Relay Order*").

37 *Comments of Earthlink, Inc. on IP-Enabled Services NPRM*, WC Docket No. 04-36 at 14 (filed May 28, 2004).

38 *Frame Relay Order*, 10 FCC Rcd. at 13719 (¶ 16).

39 *See* 47 U.S.C. § 153(20)(information service) and (43)(telecommunication).

### C. Qwest's Proposed Construction of the ESP Exemption is Inconsistent with the Single POI Per LATA Rule and is Anticompetitive.

Qwest maintains that reciprocal compensation applies to IP-PSTN traffic under the ESP exemption *only so long as the VoIP provider's Point of Presence ("POP") is located in the same local calling area as the called party*.[40] Qwest's emphasis on whether the VoIP provider's POP is located in the same local calling area is misplaced. Under the Commission's existing interconnection rules, CLECs are entitled to interconnect with ILECs at a *single* Point of Interconnection ("POI") in a given LATA. Moreover, under court and Commission precedent, each LEC must deliver its traffic to the POI selected by the CLEC, and each LEC recovers the costs of delivering that traffic from its end users, not its competitor. As further explained below, Qwest's position is in direct conflict with these well-established rules and would lead to patently absurd results.

#### 1. Qwest's Position, if Implemented, Would Lead to Absurd Results.

Qwest's attempt to limit the ESP exemption to circumstances in which the VoIP provider's POP is located in the same local calling area as the called party would lead to patently absurd results, as Exhibit 3 illustrates. Exhibit 3 illustrates a situation in which the CLEC and ILEC have agreed to interconnect at the ILEC tandem. Pursuant to that interconnection agreement, parties exchange traffic for the local calling areas shown in the diagram through that point of interconnection. The ILEC tandem has subtending end offices in multiple local calling areas.

Suppose, for example, that User B (a subscriber to a VoIP service using his or her cable modem or DSL line) places an IP-PSTN call to his next-door neighbor, User A. Under

---

[40] *See* Qwest Comments at 15, 44-46; *See also Letter from Crenan O'Donnell, Qwest Communications Int'l Inc., to Marlene H. Dortch, FCC*, WC Docket No. 03-266 (filed February 7, 2005).

Qwest's interpretation of the ESP exemption, the call from User B to User A would lead to the following results:

- If User B is served by $ESP_1$, then reciprocal compensation would apply to the call, and the CLEC would pay the ILEC the applicable reciprocal compensation rate (or, if the ILEC had elected .0007 under the *ISP Remand Order*, the mirrored ISP-bound rate). That is because $ESP_1$ is located within the same local calling area as User A, the called party, so the ESP exemption applies.

- If User B is served by $ESP_2$, Qwest would impose terminating access charges on the CLEC serving $ESP_2$. That is because $ESP_2$ is outside the local calling area of the called party (but within the same LATA).

By the same token, suppose that User A (Qwest's subscriber) places a PSTN-IP call to his or her next-door neighbor, User B (the IP service subscriber). This is a locally dialed call, with both User A's phone number and User B's phone number rated to the same ILEC local calling area. Under Qwest's view:

- If User B is served by $ESP_1$, reciprocal compensation would apply.

- But if User B is served by $ESP_2$, Qwest would impose originating access charges on the CLEC serving $ESP_2$.

Qwest's results make no sense: the calls in all cases are between the same two next-door neighbors, exchanged between the same ILEC and CLEC, and traverse the same PSTN facilities. As the diagram shows, regardless of where the ESP is located, *there is no difference in how Qwest transports the traffic across its network*. To the contrary, in the case of the IP-PSTN call, Qwest merely accepts traffic from the CLEC serving the ESP at the POI and terminates the call to User A. Likewise, in the case of the PSTN-IP call, Qwest carries the call that originates with User A to the POI, where Qwest hands the call off to the CLEC that terminates the call with User B. In other words, the only thing that changes is the location of the ESP behind the POI. Qwest's transport costs, by contrast, remain constant.

### 2. There Is No Legal or Policy Reason to Limit the ESP Exemption to Situations In Which the ESP Is In the Same Local Calling Area as the PSTN End User.

#### a) The 1996 Act, as Implemented by the Commission's Rules, Entitles CLECs to Interconnect with ILECs at a Single POI per LATA.

Under 47 U.S.C. § 251(c)(2)(B), an ILEC must provide interconnection at any technically feasible point within its network selected by a CLEC. The Commission's rules have interpreted this statutory obligation to entitle a CLEC to select a single POI within each LATA for the exchange of both parties' traffic.[41] For instance, in the *Texas 271 Order,* the Commission stated in pertinent part that "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. *This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.*"[42]

In addition, each LEC is financially responsible for delivering its originating traffic to the POI selected by the CLEC. Under Section 51.703(b) of the Commission's rules, a LEC may *not* assess access charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.[43] The Fourth Circuit Court of Appeals interpreted this rule in *MCIMetro Transmission Services Inc. v. BellSouth*

---

[41] *See, e.g., Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region InterLATA Services in Texas,* Memorandum Opinion and Order, 15 FCC Rcd. 18354, 18390 (¶ 78) (2000) ("*Texas 271 Order*"); *Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, 9634-35, 9650-51 (¶¶ 72, 112) (2001) ("*Intercarrier Compensation NPRM*").

[42] *Texas 271 Order*, 15 FCC Rcd. at 18390 (¶ 78) (emphasis added).

[43] *See* 47 C.F.R. § 51.703(b) ("A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.").

*Telecommunications, Inc.*[44] In *MCIMetro,* the court reviewed an arbitration decision from the North Carolina Utilities Commission that held MCIMetro responsible for paying the cost of transporting a BellSouth customer-originated call to the POI when MCIMetro designated a POI outside the local calling area of the BellSouth customer. Reversing the Commission's decision, the court found that it was "left with an unambiguous rule, the legality of which is unchallenged, that prohibits the charge that BellSouth seeks to impose. Rule [51.]703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions."[45]

In short, under the current rules, each LEC must deliver its traffic to the POI selected by the CLEC, and each LEC recovers the costs of delivering that traffic from its end users, not its competitor.[46] The CLEC is responsible for the cost of delivering traffic across it network to the POI, and conversely, the ILEC shares the same responsibility on its side of the POI. Qwest's proposal – which would limit the ESP exemption to circumstances in which

---

[44] *See MCIMetro Transmission Services Inc. v. BellSouth Telecommunications, Inc.,*352 F.3d 872 (4th Cir. 2003) ("*MCIMetro*").

[45] *Id.*, 352 F.3d at 881.

[46] In the *Virginia Arbitration Order*, the Wireline Competition Bureau rejected a similar proposal advanced by Verizon. *See Petition of WorldCom, Inc., Cox Virginia Telecom Inc., and AT&T Communications of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.,* Memorandum Opinion and Order, 17 FCC Rcd. 27039, 27064-65 (¶ 53) (2002) ("[U]nder Verizon's proposed language, the competitive LEC's financial responsibility for the further transport of Verizon's traffic to the competitive LEC's point of interconnection and onto the competitive LEC's network would begin at the Verizon-designated competitive LEC IP, rather than the point of interconnection. By contrast, under the petitioners' proposals, each party would bear the cost of delivering its originating traffic to the point of interconnection designated by the competitive LEC. The petitioners' proposals, therefore, are more consistent with the Commission's rules for section 251(b)(5) traffic, which prohibit any LEC from charging any other carrier for traffic originating on that LEC's network; they are also more consistent with the right of competitive LECs to interconnect at any technically feasible point.").

the VoIP provider's POP is located in the same local calling area as the called party (*i.e.,* User B, an IP-enabled service subscriber, is served by $ESP_1$ but not $ESP_2$) – is therefore in direct conflict with both the 1996 Act and current Commission precedent.

#### b) The Single POI per LATA Rule Does Not Generate Additional Costs for ILECs Beyond that Associated with Interconnection for "Local" Calls.

The location of an ESP's POP behind the POI has no effect whatsoever on the LEC's costs to originate traffic on its network.[47] All traffic generated between ILEC end users and CLEC end users is exchanged between the ILEC network and the CLEC network at the POI. Each LEC has an obligation to bring its traffic to the POI, regardless of where it originated within the LATA. From that point, the terminating LEC is responsible for all transport associated with delivering the call to the called party. As a result, transport arrangements on the originating LEC's side of the call are identical regardless of the location of the terminating LEC's customer; indeed, it simply makes no difference where the terminating LEC's customer is located behind the POI. Importantly, CLECs such as Level 3 are *not* seeking *additional* compensation from the ILEC for transport and termination when the ESP is not located within the calling party's local calling area.

### D. There is No Legal Basis for Assessing Intrastate Access Charges on IP-PSTN Traffic.

Some ILECs have proposed assessing intrastate access charges on IP-PSTN VoIP traffic, notwithstanding the Commission's ruling that such traffic is subject to the Commission's interstate jurisdiction. In the Commission's *Vonage Order*, however, the Commission ruled that IP-PSTN traffic of the type described by Vonage "precluded[d] any practical identification of,

---

[47] *See Letter from John T. Nakahata,Counsel for Level 3 Communications LLC, to Marlene H. Dortch*, CC Docket Nos. 96-98, 99-68 and 01-92 at 6 (filed Feb. 3, 2005).

and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme," and thus fell within the FCC's jurisdiction.[48]

Having preempted state jurisdiction, no party has ever offered up a theory under which the FCC could nonetheless direct that *intrastate* access charges would apply to this *interstate* service. In note 46 of the *Vonage Order*, the Commission noted that it was "not decid[ing] here the appropriate *federal* regulations, if any, that will govern this service in the future," leaving little question that the Commission was foreclosing application of state regulation to these services.[49] Indeed, in an apparent recognition of the legal frailty of imposing intrastate access charges on an interstate VoIP service, during a press briefing concerning the Level 3 forbearance petition, Verizon officials apparently told reporters that they were not asking that intrastate access charges apply to intrastate IP-PSTN VoIP.[50]

### E. Imposing Interstate Access Charges on All IP-PSTN VoIP Traffic Would be Anti-Competitive.

In its comments, SBC suggests that the Commission order interstate access charges to be paid on all IP-PSTN VoIP traffic. The Commission should reject SBC's suggestion.

Applying originating interstate access charges to all IP-enabled service traffic that originates on the PSTN but terminates on IP networks would create the same result as the pre-1996 Act LEC-CMRS arrangements: ILECs would collect access charges on all traffic

---

48 *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, 22411-12 (¶ 14) (2004).

49 *Id*., 19 FCC Rcd. at 22,411 (¶ 14 n.46) (emphasis added).

50 *See* Lynn Stanton, *Verizon Raises Specter of State-by-State Rate Battles in Level 3 Proceeding*, TR Daily, Feb. 28, 2005 ("[C]ompany officials, who spoke on condition of anonymity, said they were not asking that intrastate access charges apply to long distance VoIP-PSTN traffic when the calling and called party are in the same state.").

bound to or from a VoIP provider.[51] If SBC's view were to prevail, SBC and other ILECs could once again use intercarrier compensation charges to raise rivals' costs and thereby insulate themselves against competition. Economists, antitrust scholars, and the Commission have long recognized the risks of anticompetitive harm posed by "raising rivals costs" strategies.[52]

Even if SBC intended only to propose to collect interstate access charges for termination on all VoIP traffic, its proposal would still be anticompetitive. FCC statistics reflect that, on average, approximately 80% of traffic is local, rather than toll traffic.[53]

---

[51] Prior to the implementation of the 1996 Act's reciprocal compensation provisions, ILECs frequently charged CMRS providers both to originate calls from and terminate calls to the ILEC network. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, 15993-16007 (¶¶ 999-1026) (1996). After the Act was passed, the FCC's new reciprocal compensation rules banned origination charges and limited ILEC termination charges. *See* 47 C.F.R. §§ 51.703(b) (banning origination charges) and 51.705-711 (limiting transport and termination rates, setting rate structure rules, and requiring that transport and termination charges be symmetrical). As a result of these rule changes, ILECs could not use intercarrier compensation charges to raise CMRS providers' costs in order to marginalize CMRS competition, and CMRS services were therefore better able to compete with wireline services.

[52] *See, e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209, 214 (1986). (suggesting a unified standard to assess exclusionary conduct, including raising rivals' costs); Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 263-64 (1987) (arguing that the presence of either of the two types of anticompetitive economic power, raising one's own prices and raising competitors' costs, should suffice for a violation); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Third Report and Order, 12 FCC Rcd. 15,756, 15,802-03 (¶ 83 & n.214) (1997) (recognizing the competitive harm inherent in an exercise of "Bainian" market power, "which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output").

[53] *See Industry Analysis and Technology Division, Wireline Competition Bureau, Universal Service Monitoring Report,* CC Docket No. 98-202 (October 2002). Table 8.3 (3.909 trillion local DEM out of 4.998 trillion total DEM in 2000).

SBC's proposal, however, would subject local IP-PSTN terminating VoIP traffic to much higher interstate access charges rather than lower reciprocal charges. Such a result would unreasonably discriminate against VoIP providers.

## III. ANY FINAL INTERCARRIER COMPENSATION REGIME SHOULD NOT TREAT ISP-BOUND TRAFFIC DIFFERENTLY FROM ALL OTHER TRAFFIC EXCHANGED BETWEEN CARRIERS, AND MUST RESPOND TO THE WORLDCOM REMAND.

### A. The ICF Plan Proposes a Reasonable and Legally Justifiable Interim Treatment of ISP-Bound Traffic.

Unlike many other plans, the ICF Plan proposes a balanced resolution of the Commission's ongoing assessment of ISP-bound traffic. Among other things, the ICF Plan creates a unified, rather than a fractured, intercarrier compensation regime; offers a system that is consistent with the Commission's finding in the *ISP Remand Order* that "carriers likely incur the same costs when delivering a call to a local end user and a data call to an ISP;"[54] can be fully reconciled with the D.C. Circuit's decision in *WorldCom v. FCC;*[55] and does not result in dramatic increases to ISP-bound compensation rates. Level 3 emphasizes that the ICF Plan's provisions with respect to ISP-bound traffic are fair because they are part of a balanced package, and they are rational because they are part of a transition to a unified intercarrier compensation system.

---

[54] *Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd. 20179, 20187-88 (¶ 24) (2004) ("*Core Forbearance Order*") (*citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9194 (¶ 90) (2001) ("*ISP Remand Order")* ("a LEC generally will incur the same costs when delivering a call to a local end-user as it does delivering a call to an ISP.")).

[55] *See Worldcom, Inc. v FCC,* 288 F.3d 429 (D.C. Cir 2002).

The ICF Plan would immediately resolve a number of ongoing disputes regarding ISP-bound traffic. The default rate for ISP-bound compensation, as well as all other reciprocal compensation traffic, would drop from $.0007 to $.00035 per minute and then transition to the unified intercarrier compensation rate of $.000175 that applies to all terminating traffic after three years.[56] The initial $.00035 rate is at the lower end of negotiated rates.[57] However, as a default, all ISP-bound traffic, other than a state that ordered all ISP-bound and non-ISP-bound traffic, that do not pass through an end user's presubscribed interexchange carrier would expressly be compensable to the CLEC serving the ISP, subject to certain limits.[58] In other words, the ICF Plan treats virtual NXX or virtual FX ISP-bound traffic the same as all other locally-dialed (dialed to a locally-rated NPA-NXX) ISP-bound traffic, ending the disputes over the status of virtual NXX/virtual FX traffic.[59] This traffic would not be subject to interstate or intrastate originating access charges.[60] The Plan also has growth protections for incumbent LECs, in the unlikely event that ISP-bound traffic began to grow.

These balanced interim terms permit carriers serving ISPs to have business stability and the ability to plan for a predictable decline in intercarrier termination revenue. These CLECs, like all other carriers, are not subjected to a flash-cut change. Moreover, the ICF Plan reduces ISP-bound rates along with all other rates. Unlike some of the ILEC proposals, the ICF Plan is not a "heads-I-win, tails-you-lose" proposition for the ILECs. ILECs will

---

[56] *See* ICF Plan at 42-43.

[57] Under the Level 3/SBC interconnection agreement, the reciprocal compensation rate, including ISP-bound traffic, will be $.0004 beginning January 1, 2006 and $.00035 beginning January 1, 2007, assuming the agreement is not terminated.

[58] *Id.*

[59] *See* ICF Plan at 41-42.

[60] *See id* at 41.

have to reduce the rates they charge (both access and reciprocal compensation), but they will also receive the benefit of lower rates for the types of compensation for which they are net payors. This maintains discipline on the ILECs, requiring them to balance their interests as both payors and recipients of intercarrier compensation, rather than allowing them to charge high rates for the compensation they receive, while insisting on low – or no – compensation for the rates they pay.

Adopting the ICF Plan, including its interim ISP-bound provision, will ensure that intercarrier compensation reform does not disrupt the retail market for dial-up Internet access. Some ILEC proposals, such as those that would apply originating access either to all ISP-bound traffic or to all virtual NXX/virtual FX traffic, would greatly increase the costs of providing dial-up Internet access, and could force the dial-up ISPs to either reconfigure their own service relationships or discontinue serving some areas. As discussed below, such actions would disproportionately harm rural and low-income consumers, who are more likely to receive their Internet connectivity through dial-up service.

As discussed in the ICF Comments and in greater detail below, the ICF Plan is also consistent with and responsive to the D.C. Circuit's decision in *WorldCom v. FCC.* The ICF Plan proposes to adopt the new intercarrier compensation rules pursuant to Section 251(b)(5). It does not rely on classifying ISP-bound traffic as "information access," as the *ISP Remand Order* did in an approach the D.C. Circuit rejected. The ICF Plan sets out a clear legal basis for its ISP-bound provisions, well integrated with its overall approach to intercarrier compensation. Thus, the ICF Plan allows the Commission to take action in response to the D.C. Circuit's *WorldCom* decision.

### B. The Public Interest Does Not Require Applying Originating Access Charges to Some or All ISP-Bound Traffic or Flash-Cutting to Bill-and-Keep.

As the Commission concluded in the *Core Forbearance Order*, "similar rates should apply to both local voice traffic and ISP-bound traffic, absent compelling policy reasons to the contrary." In that Order, the Commission noted that it had already rejected ILEC pleas to "establish separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic."[61] As the Commission found, "carriers likely incur the same costs when delivering a call to a local end user and a data call to an ISP."[62] In keeping with the Commission's previous decisions, there are no "compelling policy reasons" to treat voice traffic and ISP-bound traffic differently in the current context. Indeed, the most "compelling" aspect of ISP-bound traffic pricing is avoiding any disruption to the dial-up Internet access market, which disproportionately serves lower income and rural Americans.

#### 1. ISP-Bound Traffic is Declining.

Those ILECs that propose immediate elimination of termination compensation for ISP-bound traffic are living in a pre-broadband yesteryear. According to a Sanford Bernstein report, broadband subscribership now exceeds dial-up subscribership, and dial-up will continue to decline dramatically, with broadband serving over two-thirds of Internet

---

61 *Core Forbearance Order*, 19 FCC Rcd. at 20188 (¶ 24).

62 *Id*. *See also ISP Remand Order*, 16 FCC Rcd. at 9195 (¶ 91) ("We are not persuaded by commenters' claims that the rates for delivery of ISP-bound traffic and local voice traffic should differ because delivering a data call to an ISP is inherently less costly than delivering a voice call to a local end-user."); 9195-96 (¶ 92) ("Nor does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 251(b)(5). . . . The proximity of the ISP or other end-user to the delivering carrier's switch, however, is irrelevant to reciprocal compensation rates. The Commission concluded in the *Local Competition Order* that the non-traffic sensitive cost of the local loop is not an 'additional' cost of terminating traffic that a LEC is entitled to recover through reciprocal compensation.").

households by the end of 2006.[63] The subscribers at the top four dial-up ISPs in the first quarter of 2005 declined at an annualized rate of over 20% -- and the rate of decline has accelerated sharply, up from just a 1% annualized decline in the fourth quarter 2002.[64] As the Commission's own data shows, broadband subscribership has continued to explode, increasing 34% in 2004 alone, with many dial-up subscribers converting to broadband.[65]

In this context, the concerns about "arbitrage" from ISP-bound traffic seem almost quaint. To the extent there ever was an "arbitrage" opportunity – one created by the ILECs' own initial insistence on high reciprocal compensation rates to attempt to insulate their above-cost access revenues – that opportunity is clearly in substantial and significant decline. By the time the Commission adopts and implements an intercarrier compensation reform, dial-up subscription will be less than half its peak in 2002 (is this the correct year??).[66] There is simply no "crisis" of ISP-bound compensation that merits flash cutting ISP-bound traffic to bill-and-keep recovery ahead of the compensation regime for all other telecommunications traffic, and there are no "compelling reasons" that require treating ISP-bound traffic differently from all other reciprocal compensation traffic.

---

63 *See* Bernstein Research Call, "Broadband Competition Intensifies as Penetration Advances; Price and Speed Define Main Battle Lines," at 2 and Exhibit 20 (June 15, 2005) ("*Bernstein June 15, 2005 Report*"),

64 *See id.* at Exhibit 15 (data for first quarter 2005); Bernstein Research Call, "Broadband Update: Broadband Trending Towards 100% of Internet Connections; Cable's Share Advantage Narrowing," Exhibit 6 (March 15, 2005) (data for fourth quarter 2002).

65 *See* Federal Communications Commission, "Federal Communications Commission Releases Data on High-Speed Services for Internet Access" (rel. July 7, 2005).

66 *See Bernstein June 15, 2005 Report*, at Exhibit 20.

### 2. Treating ISPs as Carriers in Order to Impose Access Charges Will Increase Dial-Up Internet Access Prices, Hurting Rural Consumers in Particular.

As Level 3 has previously informed the Commission, apply originating access charges to ISP-bound traffic under any theory will harm rural consumers, and serve both to limit their options for dial-up Internet access and to increase their costs. As Level 3 has previously explained, rural carriers' pleas to impose access charges on service to dial-up ISPs is little more than pure protectionism.[67]

In its February 2004 study entitled "Rural Areas and the Internet," the Pew Internet & American Life Project found:

- 23% of US adults (46 million) live in rural communities.[68]
- Rural consumers are less likely to use the Internet than urban consumers (52% rural v. 67% urban/66% suburban in 2003).[69]
- Rural consumers are disproportionately dependent upon dial-up Internet access (80% dial-up in rural areas v. 63% dial-up in urban areas in 2003).[70]
- 29% of rural Internet users (and 31% of rural dial-up users) report that their ISP is the only ISP available to them. When asked to identify their ISPs, 46% named small local providers, more than double the figure for urban and suburban users.[71]
- By contrast, 25% of urban consumers and 17% of suburban consumers reported they selected their ISP based on a promotional offer or deal.[72]

---

67 *See Letter of John T. Nakahata, Counsel to Level 3 Communications, LLC, to Marlene H. Dortch,* CC Docket No. 99-68, 96-98, 01-92, (filed December 10, 2004), incorporated by reference herein.

68 *See* Bell, Rainie, and Reddy, "Rural Areas & the Internet: Rural Americans' Internet use has grown, but they continue to lag behind others." *Pew Internet & American Life Project*, at 7 (February 17, 2004)., attached as Exhibit 4.

69 *See* i*d.* at i.

70 *See id* at 13.

71 *See id* at ii, 9.

- Rural dial-up Internet users are equally as likely as urban and suburban dial-up users to want a broadband connection.[73]

- Rural areas are poorer: rural areas have a much larger percentage of households with annual incomes under $30,000 (47%) than urban (39%) and suburban (29%) areas. $30,000 is a significant threshold for going online in all communities.[74]

The conclusions of the Pew Study have several important implications when considering intercarrier compensation reform for ISP-bound traffic. First, notwithstanding the growth of broadband and the overall decline of dial-up, dial-up is still an important source of Internet access in rural areas. Second, imposing access charges on ISP-bound traffic will reduce the availability of nationwide, low-cost Internet access options in rural areas. Already, the Pew report reveals that almost a third of rural dial-up users reported that their ISP was only one available to them. If access charges are imposed on ISP-bound traffic, the nationwide dial-up ISPs that offer low price alternatives will have even less incentive to serve rural areas. Third, because rural areas are poorer, increasing the price of dial-up will disproportionately affect the ability of rural consumers to afford any form of Internet access.

Applying access charges to ISP-bound traffic is therefore regressive and inconsistent with Section 254's universal service principle that "consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and *information services* . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably

---

[72] *See id.* at 10.

[73] *See id*. at 15.

[74] *See id*. at ii.

comparable to rates charged for similar services in urban areas."[75] If access charges are applied to ISP-bound traffic, dial-up Internet access will become less available in rural areas than in urban areas – and available only at higher prices than in urban areas. That does not promote the Act's universal service goals.

### C. The Commission Should Clarify that All ISP-Bound Traffic is Rated on the Basis of the NPA-NXX Pending Comprehensive Reform.

As Level 3 has previously argued, the Commission should clarify that all ISP-bound traffic is to be rated on the basis of the NPA-NXX pending completion of comprehensive reform. Level 3 has previously explained both the legal and substantive basis for such action, and will not repeat the full discussion here, but instead incorporates its earlier filings by reference.[76] The following discussion summarizes those arguments.

As the ICF has fully explained in its comments, Section 251(b)(5) covers all telecommunications other than traffic temporarily excluded pursuant to Section 251(g). Moreover, as Level 3 has previously explained, because the D.C. Circuit in *WorldCom* found that ISP-bound traffic did not fall within Section 251(g), inasmuch as there was no pre-1996 rule governing the exchange of ISP-bound traffic between LECs, all locally-dialed ISP-bound traffic falls within the scope of Section 251(b)(5).[77]

---

[75] 47 U.S.C. § 254(b)(3).

[76] *See Letter of John T. Nakahata, Counsel to Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC,* CC Dockets No. 99-68, 96-98, 01-92, (filed February 3, 2005) ("*Level 3 February 3, 2005 Ex Parte*").

[77] *See id*.; *see also* "Sections 251(b)(5) and 252 (d)(2)Govern ISP-Bound Traffic Are Not Limited to 'Local' Termination" attached to *Letter of John T. Nakahata, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC,* CC Dockets Nos. 96-98, 99-68 (filed June, 23, 2004)., Exhibit 5, attached; *Letter of Christopher J. Wright and John T. Nakahata, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC*, CC Dockets No. 96-98, 99-68, 01-92, 03-171 (filed October 4, 2004)("*Level 3 October 4, 2004 Ex Parte*"), Exhibit 6, attached.

Moreover, ISP-bound traffic, whether virtual NXX traffic or otherwise, is not "exchange access" as that term is defined in the Communications Act. The Communications Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[78] "Telephone toll service" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[79] There is, however, no "separate charge" levied by CLECs that offer virtual NXX service. The statutory definition plainly contemplates a traditional interexchange call, in which an interexchange carrier charges the end user for interexchange transport separately from that end user's local service. CLECs offering virtual NXX services, however, offer these services as part of their tariffed local service offerings, such as Direct Inward Dialing service. Further, when an end user calls a virtual NXX number, that end user is not billed for making a toll call, and neither is the called party. As a result, there is no "separate charge not included in contracts with subscribers for exchange access" and calls to virtual NXX numbers cannot satisfy the definition of exchange access.

In addition, virtual NXX service does not result in toll bypass. One alternative that would resolve ILECs' supposed concerns, particularly in rural areas, would be for the ISP simply not to offer service. Another alternative is not for the ISP to purchase toll service, but to install additional transport to carry calls momentarily into each ILEC local rate center. For example, the ISP could buy private lines and interconnect those private lines to PRIs or DID trunks to create a point of presence located within each ILEC-defined local calling area, even if the servers remained centralized. But forcing an ISP to purchase transport links simply to

[78] 47 U.S.C. § 153(16).

[79] 47 U.S.C. § 153(48).

mimic the ILEC's historical network architecture needlessly introduces inefficiency that raises the ISP's costs (and resulting rates) to provide dial-up Internet access to its end user customers. This result would be particularly silly if the CLEC provided PRIs or DID trunks. Under such an arrangement, the ILEC would carry the traffic to its Point of Interconnection ("POI") with the CLEC, the CLEC would carry the traffic back to the local calling area to reach the private line, and the traffic would then be routed to the ISP server. Virtual NXX arrangements, by contrast, eliminate the CLEC's duplicate transport back to the local calling area, while at the same time imposing no greater obligation on the ILEC – *i.e.*, the ILEC must carry traffic to the same POI regardless of where the traffic is routed after it reaches the POI.

Significantly, as discussed in section II.C.2.b., above, virtual NXX arrangements do not generate additional costs for ILECs beyond those associated with interconnection for any other ISP-bound traffic.[80] All traffic generated by ILEC end users and CLEC end users is exchanged between the ILEC network and the CLEC network at a POI within a LATA. Each LEC has an obligation to bring its traffic to the POI, regardless of where it originated within the LATA. From that point, the CLEC is responsible for all the transport associated with delivering the call to the called party. Thus, the ILEC's transport cost is solely determined by the location of the POI at which the ILEC hands off the traffic to the CLEC, and not at all by whether the ISP server is located within the ILEC's local calling area or in a different local calling area or state.

---

[80] *Cf. Letter from Donna Epps. Verizon, to Marlene H. Dortch, FCC,* CC Docket Nos. 99-68, 01-92, at 2, Attachment A at 1-2 (filed December 16, 2004).

Virtual NXX arrangements also do not increase transport costs for rural ILECs.[81] As Level 3 previously explained to the Commission, in areas subject to the rural exemption in Section 251(f)(1), CLECs serving ISPs interconnect with the rural ILEC within the rural ILEC's local calling areas, usually at the rural ILEC's end office.[82] In this situation, the ILEC does not incur any additional interoffice transport costs if the ISP's server is located outside the rural ILEC's local calling area. In areas where the Section 251(f)(1) exemption has been lifted, it has generally been Level 3's experience that it still ends up transporting traffic from the rural ILEC service territory.[83]

On the other hand, virtual NXX arrangements promote affordable Internet access, particularly in rural areas. First, virtual NXX arrangements allow ISPs to serve an entire LATA from a single server (or even multiple LATAs or multiple states), reducing the costs of serving rural areas by allowing those areas to share economies of scale and scope. Second, virtual NXX arrangements enable CLECs to consolidate switching into regional switching centers that allow CLECs to take advantage of the decreased cost of processing calls. This is vastly different from ILEC networks, which have multiple switches in small rate centers because they were largely constructed in a monopoly environment that guaranteed a profit on investment. Efficient distribution enables more consumers to benefit from low-priced dial-up Internet access, expanding the availability and usefulness for those

---

81 *Cf. id.* at 4-5.

82 *See Letter from John T. Nakahata, Counsel to Level 3 Communications, LLC, to Marlene H. Dortch*, CC Docket Nos. 99-68 and 01-92 (filed Nov. 23, 2004).

83 Likewise, virtual NXX traffic does not "burden" ILEC shared transport facilities. A common feature of interconnection agreements is the requirement that, above a specified traffic threshold (often two DS1s), the CLEC will groom traffic for direct transport to the ILEC end office. These provisions limit any "burden" on ILEC shared transport by excluding higher call volumes.

Americans who are not ready to make the jump to broadband or for whom broadband is not yet affordable.

Accordingly, the Commission should clarify that all ISP-bound traffic is rated according to its NPA-NXX, pending the completion of comprehensive reform.

### D. The Rural Alliance's Proposed "Preservation" of the ESP Exemption Only for ILEC Services is Anticompetitive.

In its comments, the Rural Alliance proposes that the Commission retain the ESP exemption – or more accurately, ISPs' status as end users under the access rules – when an ISP buys its services from the originating ILEC. The Rural Alliance also proposes, however, that if an ISP buys services from a CLEC which then interconnects with the ILEC, the ISP would be subject to originating access charges assessed by both the ILEC and the CLEC.[84] It is hard to imagine a more blatantly self-serving and anticompetitive proposal, or a proposal that exemplifies more clearly why the intercarrier compensation regimes must be unified in a manner that eliminates origination charges.

When a CLEC serves an ISP in an RLEC territory, both the CLEC and the ILEC compete to provide service to that ISP. Either the CLEC sells the ISP a business line service or the RLEC does. The business line service that both the CLEC and the RLEC offer is the ability to receive calls. (Of course, the line may also have the ability to place calls, but an ISP that only receives traffic would not use that feature.) At the same time, the RLEC collects a service fee from its end user, representing its charge for the ability to place calls to locally-rated telephone numbers.

---

[84] *See* Rural Alliance Comments at n. 334.

Yet the Rural Alliance proposes to treat these identical retail relationships differently. In the case of a call routed to the ISP when the ISP is the RLEC's retail customer, the Rural Alliance argues that the calling party's retail local service should include the ability to call the ISP. However, when a CLEC provides the retail network connectivity to the ISP, the calling party's retail service suddenly would not include the call to the same ISP – even if routed to the same telephone number.

Moreover, as discussed above, because of the rural exemption under Section 251(f), there will usually be no difference in the RLEC facilities traversed by this call from a dial-up customer to the dial-up ISP. When Level 3 interconnects with a rural ILEC subject to the rural exemption, Level 3 interconnects at the RLEC's end office. Thus, when an RLEC end user customer calls an ISP served by Level 3, the RLEC provides the loop and end office switch, and Level 3 carries the call from the RLEC switch to the ISP. These are the same facilities (other than the loop connection from the RLEC to the ISP) that would be used if that same RLEC end user customer called an ISP served by the RLEC: the call would originate over the individual end user's loop and would traverse the switch, before being sent to the ISP over the RLEC's loop.

What this example really points out is that the Commission must unify all intercarrier compensation regimes under the unified structure that applies to Section 251(b)(5) traffic today – with no origination charges. Doing so will eliminate the need to determine when a call is subject to Section 251(b)(5) (and thus exempt from origination charges) and when a call is subject to access (and thus subject to origination charges). When intercarrier compensation is limited at most to termination, and when rates are unified across jurisdictions, the tension between the reciprocal compensation and the access charges

systems will be resolved, without repealing the treatment of ESPs as end users under the access charge rules.

### E. The FCC has Authority Pursuant to Sections 251(b)(5) and 201 to Establish Transitional Rates for ISP-Bound Compensation Pending Comprehensive Reform.

As discussed above, and as more fully set forth more in Level 3's *ex partes* dated June 23, 2004, September 13, 2004, and October 4, 2004, when both Sections 201 and 251(b)(5) apply, the Commission, pursuant to Section 251(i), retains authority to set prices for reciprocal compensation, but it is not required to do so. Such a reading harmonizes Sections 251(b)(5), 252(d)(2), 251(i). If Section 252(d)(2) is read to preclude the FCC, under any and all circumstances, from setting reciprocal compensation rates for traffic falling within Section 201 and 251(b)(5), that would appear to contradict Section 251(i)'s preservation of the Commission's pre-existing authority under Section 201. In that case, Section 252(d)(2) would impermissibly "limit or otherwise affect the Commission's authority under section 201 of the Act."[85] However, the Commission is not required to set such prices, and may defer to state rate-setting in arbitration pursuant to Section 252(d)(2), or to voluntary agreements negotiated between carriers pursuant to Section 252(a)(1). To give meaning both to Sections 201 and 252, however, the Commission would be required to set prices in accordance with the substantive standards set forth in both sections.

#### 1. The Commission's Pricing Jurisdiction When 201 and 251(b)(5) Apply.

When traffic falls within both Sections 201 and 251(b)(5), the approach most immune from legal challenge would be for the FCC to adopt rules governing the methodology for

[85] 47 U.S.C. § 251(i).

establishing reciprocal compensation rates under the additional cost standard in Section 252(d)(2)(A)(ii), and for the states to set those rates in arbitration when the parties cannot themselves agree on a rate. This is precisely the scheme that was adopted by the Commission in the *Local Competition Order*, with respect to CMRS traffic over which the Commission also had jurisdiction pursuant to Section 332.[86] And Supreme Court upheld this approach in *AT&T v. Iowa Utility Board*.[87]

When the Commission, however, believes that it has important policy reasons to do so, it can set rates for traffic that falls within both Section 201 and 251(b)(5). Reading Section 251(i) to preserve the Commission's pre-1996 rate-setting authority under Section 201 gives meaning to both Section 251(i) and Section 252(d)(2). Under Section 252(d)(2), the states can set rates for interconnection, unbundled network elements, and reciprocal compensation, regardless of traditional jurisdictional boundaries, when presented with a dispute in arbitration, although the state must do so in accordance with any FCC-prescribed methodology. However, when the Commission chooses to exert its authority under Section 201, the Commission has parallel jurisdiction to set such rates with respect to interconnection, network elements, and reciprocal compensation, as such authority falls within its traditional Section 201 jurisdiction over interstate and foreign communications. The Commission recognized as much when it acknowledged that Sections 332 and 201 provided it with the basis for jurisdiction to set LEC-CMRS interconnection rates, including

---

[86] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15,499, 16,005 (¶ 1023) (1996) ("*Local Competition Order*").

[87] *See* 525 U.S. 366 (1999) ("*AT&T*").

reciprocal compensation rates, in the *Local Competition Order*.[88] But the Commission has no jurisdiction, other than its ability to establish pricing methodologies, with respect to interconnection, network elements, and reciprocal compensation for traffic that lies outside its Section 201 (or Section 332) jurisdiction over interstate and foreign (or CMRS) traffic.

Neither the Supreme Court's decision in *AT&T* nor the Eighth Circuit's subsequent *Iowa II* decision addressed the Commission's authority to set prices with respect to those network elements or services that were under the Commission's jurisdiction pursuant to some section other than Sections 251 and 252.[89] Indeed, both decisions addressed only the Commission's authority to establish a pricing methodology for network elements and services that the Eighth Circuit had previously held were not interstate or foreign within the FCC's section 201 jurisdiction, but instead were predominantly intrastate.

The Supreme Court's discussion of state rate-setting authority in *AT&T* is spare, and not on point here. In short, the Court rejected respondents' arguments that the FCC's pricing standards constituted the "establishment of rates" in violation of Section 252(d). Instead, the Court concluded that the establishment of a pricing methodology did not constitute the establishment of rates.[90] The Court was not considering, nor was it asked to consider, whether the FCC could, under circumstances not specifically presented in that case, set rates for services or network elements that fell within Section 201 and Section 251.

Similarly, when the Eighth Circuit vacated the Commission's default proxies in *Iowa II* as impermissible FCC rate setting, it did not consider whether such proxies fell within

---

88 *See Local Competition Order*, 11 FCC Rcd. at 16,005 (¶ 1023).

89 *See AT&T*, 525 U.S. 366; *Iowa Utils. Bd. v. FCC,* 219 F.3d 744 (8th Cir. 2000). ("*Iowa II*").

90 *See AT&T*, 525 U.S. at 384.

sources of Commission rate-setting authority outside of Sections 251 and 252.[91] To the contrary, the default proxies applied to network elements that would have been considered intrastate under an end-to-end jurisdictional analysis. In that context, it is not at all surprising that the Eighth Circuit vacated what it viewed as FCC actions to set intrastate rates. Under Level 3's interpretation of Section 251(i), the Eighth Circuit would still have vacated the FCC's pricing proxies as applied to all interconnection, network elements and reciprocal compensation.

Accordingly, interpreting Section 251(i) to preserve the FCC's rate-setting jurisdiction with respect to reciprocal compensation arrangements within the scope of both Sections 201 and 251(b)(5) harmonizes all parts of the Act, and is not precluded by *AT&T* or *Iowa II*.

### 2. The Commission Must Be Guided by Section 252(d)(2)'s Pricing Rules When Both Section 201 and 251(b)(5) Apply.

Although the Commission has jurisdiction to set rates for reciprocal compensation arrangements that fall within both Section 201 and 251(b)(5), it must do so (and, in any event, prudently should do so) in accordance with the substantive pricing standards in Section 252(d)(2).

Under Section 201, rates for interstate services must be "just and reasonable," and the D.C. Circuit has held that "[a] basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost."[92] And while, under Section 201, the "FCC is not required to establish purely cost-based rates," "[t]he Commission must .

---

91 *See Iowa II,* 219 F.3d at 756-57.

92 *MCI Telecommunications Corp. v. FCC,* 675 F.2d 408, 410 (D.C. Cir. 1982).

. . specially justify any rate differential that does not reflect cost."[93] Indeed, the D.C. Circuit reversed the Commission's transport rules because the Commission had never justified why it retained the Residual Interconnection Charge, a non-cost-based element, as part of its transport rate structure.[94]

Section 252(d)(2)(A) likewise requires that charges for transport and termination pursuant to Section 251(b)(5) be "just and reasonable."[95] That section, however, further clarifies that "just and reasonable" in the context of services falling within Section 251(b)(5) means, *inter alia*, that such rates "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and it requires that such costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."[96] Thus, Section 252(d)(2)'s substantive pricing standards elaborate what Congress considered to be "just and reasonable" rates in the context of reciprocal compensation.

The Commission cannot, therefore, simply ignore Section 252(d)(2)(A)'s substantive pricing standards in setting "just and reasonable" rates for reciprocal compensation under Section 201. To do so would suggest that the same service, covered by two statutory provisions, would be subject to different substantive pricing standards depending upon whether the state was exercising rate-setting authority under a "just and reasonable" standard pursuant to Section 252(d)(2)(A), or the Commission was setting a "just and reasonable" rate

---

93 *Competitive Telecom. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

94 *See id*. at 532.

95 47 U.S.C. § 252(d)(2)(A).

96 *Id.*

under Section 201. While the Act may be a "model of ambiguity or indeed even self-contradiction,"[97] this level of contradiction would be too much. There is simply no reason to believe that Congress intended its definition of "just and reasonable" to apply only to state-established transport and termination rates rather than FCC-established transport and termination rates.

In any event, it is imprudent for the Commission to set out to create a statutory conflict between the meaning of "just and reasonable" under Section 201 and "just and reasonable" under Section 252(d)(2). Indeed, the Commission can avoid thin legal ice if it uses the Section 252(d)(2) standard to guide its determination of "just and reasonable" rates for the same service under Section 201.

### 3. The Commission Can Justify Setting Non-Cost-Based Rate Caps on a Transitional Basis.

When the Commission adopts a rate cap that it has not been found to be related to costs (such as the existing $0.0007/minute rate cap on ISP-bound intercarrier compensation), it can justifiably maintain that cap under either Section 201 or Section 252(d)(2) as a transitional or interim measure pending completion of its transition under ongoing intercarrier compensation reform proceedings. In a variety of contexts, and particularly in matters of intercarrier compensation, the courts have long upheld the Commission's authority to take reasonable transition measures to protect the industry from sudden disruption.[98]

---

[97] *AT&T*, 525 U.S. at 397.

[98] *See, e.g., CompTel v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002) ("Avoidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule.") (*citing MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984), and *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 410 (D.C. Cir. 2002)); *CompTel v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997) (upholding the FCC's transitional imposition of access charges on interconnection and UNEs provided under Section 251(c)(2), (3)).

## IV. CONCLUSION

For the foregoing reasons, the Commission should adopt the ICF Plan, which proposes the most logical and reasonable transition from today's world of conflicting intercarrier compensation regimes to a truly unified regime that is consistent with the cost-recovery practices that have emerged on IP-networks. The Commission should issue interim rules determining how IP-PSTN VoIP services will be treated in any such transition. However, the Commission should not modify the longstanding treatment of ISPs as end users with respect to all traffic exchanged between the ISP and the PSTN. Furthermore, the Commission should not, prior to adopting the ICF Plan, make additional changes to its ISP-bound rules, other than to clarify that all locally-dialed ISP-bound traffic falls within the ISP-

bound regime. The ICF Plan proposes, as a part of its comprehensive reform, a reasonable, balanced and legally supportable plan to address ISP-bound compensation during the transition to the final, reformed intercarrier compensation regime.

Respectfully submitted,

/s/

Cindy Z. Schonhaut
William P. Hunt, III
Level 3 Communications LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

John T. Nakahata
Charles D. Breckinridge
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW, Suite 1200
Washington, DC 20036
(202) 730-1300

*Counsel for Level 3 Communications LLC*

July 20, 2005